



CORE ANALYSIS

In the middle of things: the political economy of labour beyond the market

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Abstract

While legal analyses of political economy typically centre on events and processes within the market, this discussion argues that contemporary dilemmas requires attention to labour and productive activity at its edges and beyond. Questions surrounding labour provide an unparalleled vantage point from which to assess how groups are differentially situated within the economy, especially at moments of economic crisis and transformation. The constitutive role of law in market relations, in turn, makes legal analysis fundamental to understanding how risks and rewards at work are distributed.

Reflecting on the role of macroeconomic governance to work, evident in times of crisis in particular, and drawing upon concepts and tools developed within critical legal thought, this paper analyses two sites of labour, unpaid household care work and informal labour, that are at the centre of distributive struggles around work now. As the historical separation of the household and market labour discloses, transformations of legal form, and classification played a critical role in the simultaneous production of waged labour and valueless care. Similar processes are underway in labour markets now; thus, understanding the legal constitution of value and of work itself remains central to questions of inequality now.

Bargaining analysis as well as taxonomies of family law suggest the significance of a wide range of legal rules and their interaction to labour market outcomes and the position of workers. The analysis of informal work points in a similar direction, as contract, competition, and corporate law and beyond are all implicated in the growth of informality and precarity at work. Finally, uncovering the legal foundations of racial fragmentation at work requires attention to multiple legal regimes as well as the conceptual and ideological commitments that sustain them. All engage questions about the role, and transformation, of legal form, classification and consciousness within contemporary political economy.

Keywords: transformative labour law; family law; law and political economy; transformative law; critical legal theory

1. Introduction

We find ourselves *in medias res* concerning some very large questions: How, and where, have continuing crises, what some have called ‘polycrisis’ – the global financial crisis, the pandemic, intensifying economic inequality and insecurity, disruptive climate events, along with the political upheavals with which they increasingly associated – destabilised settled political and economic arrangements, along with modes of legal analysis through which we conventionally analyse them? If evidence of pressure on these arrangements is not hard to find, are there modes of analysis that might allow us to examine the legal forms, norms and practices organising these arrangements, whether canonical or novel, afresh? Still more – are there developments now underway that might signal a new moment or period in legal consciousness, even a paradigm shift in legal thought?

Or, by contrast, are we simply experiencing in full the eclectic character of contemporary legal thought, a function of the extensive repertoire of analytic and discursive moves now available to those who make legal and institutional arguments and decisions, resulting in a pronounced lack of synthesis and structure among its elements?¹

At least within critical diagnoses of political economy, it is generally accepted that markets are constituted through legal rules, norms and institutions, whatever other forces, economic, social, cultural, and political, are also at work. What is less well recognised is that markets have their own constitutive ‘outside’: the arrangement of the legal elements that make the market, of necessity and at the same time, defines what lies beyond the market and outside its sphere as well. Having delimited the market, it is tempting to then proceed as if what is left – or placed – outside can then be ignored in analyses of political economy. There are reasons to resist that temptation, however, and to pay specific attention to sites at the edges and outside the market: for their intrinsic importance, as a means of better understanding the market itself, and ultimately, for our comprehension of the economy as a totality and its processes, problems and demands.

A central feature of contemporary political economy is the separation of the domain of contract and commerce – ‘the market’ – from the family, within the taxonomy of legal relations and within social and economic life itself. This separation, an event both legal and historical that unfolded over the 19th century across the industrialised world, had far-reaching effects. Among the most direct of those effects were, along with the reconstruction of rural life, the constitution of private, purely affective families and the parallel constitution of markets for labour in which waged employment became both the emblematic form of work and the central object of regulatory interest.

Although their marginality to questions of political economy has been normalised within market-centered economies and polities as a result, the domains located at the edges of and beyond the market – the family, informal markets, communities – are not spaces of ‘merely cultural’ concern. Nor can the norms, obligations and activities within them be considered matters of purely private or local interest. Rather they are zones of production in themselves, filled with activities that affect, and that are affected by, markets. Still more, those spaces might be thought of as constitutive of the market and integral to its events, norms and relations, supplementing, stabilising and disrupting those activities and relations in a range of ways. Precisely because of this co-constitutive relationship, these outside spaces, and the activities within them have always haunted the market. With the looming ‘sense of an ending’ provoked by compounding crises underway, they are now crowding into the canonical space of political economy, the market itself.

Notwithstanding the conventional delimitation of political economy to events and processes within the boundaries of the market, there are compelling reasons to pay attention to the circuits of exchange between commodified and non-commodified spaces. Resources and people move continually across them, with important social, economic, and political consequences for those involved. It is these connections between inside and outside the market and the critical role of those who labour at its margins or outside it entirely that suggest the rationale for a redrawn conception of the economy and, by extension, a transformative approach to its legal analysis going forward. The most basic reason is simply to assess the relative position of actors and the distribution of benefits and burdens across the economy as a whole. Crises such as the pandemic make more obvious what is typically obscure or ignored entirely: this is how much resources, labour, and obligations flow across the boundaries between markets and other social and economic spaces, and how much the rules and policies directing those flows stand to affect the welfare and status of different groups. Indeed, they make it clear that such flows and transfers are a central part of how economic and social actors cope with crises – at the same time, putting in view how legal

¹D Kennedy, ‘Three Globalizations of Law and Legal Thought: 1850–2000’ in DM Trubek and A Santos (eds), *The New Law and Economic Development: A Critical Appraisal* (Cambridge University Press 2006) 19; D Kennedy, ‘A Political Economy of Contemporary Legality’ in PF Kjaer (ed), *The Law of Political Economy: Transformations of the Function of Law* (Cambridge University Press 2019) 89.

norms and institutions, directly and indirectly, channel, block and otherwise organise the processes of adjustment that occur. In the end, the impulse to examine the legal infrastructure of productive activity on both sides of the market boundary is quite basic. As the pandemic has confirmed, we are simply well past the point at which we can comprehend the political economy of the market without attention to how it works in conjunction with household and community activity; nor can we assess transformations within ‘formal’ markets in the absence of attention to norms and processes within grey and informal markets.

The very uneven costs (and it must also be said, benefits) of the pandemic-induced restructuring of social and economic life has revealed the persistence of deep differences in the labour market position of social groups, differences that systematically track gender and colour as well as class lines.² Although the path forward of legal analysis here remains schematic at best, a probing approach to political economy will consider how it is that the legal norms and institutions undergirding the world of production so reliably (re)produce gender, racial, and ethnic fissuring at work as well.

A caveat is in order at this point. There are myriad claims that nonrecognition of unpaid work – simultaneous with the capture of its value – is inherent in the deep logic of capitalism, insofar as capitalist accumulation depends on the expropriation of resources, including the work of care.³ Related claims could be advanced about the maintenance of ‘reserve’ armies of labour such as those found in informal markets, as such markets provide a ready pool of workers that can be mobilised for labour exploitation. Thus, we should be surprised to see neither enduring reliance on unpaid care work in capitalist economies nor the current expansion of informal and associated, precarious forms of work.

Yet capitalist economic relations can and do take different institutional forms. The imperatives of capital accumulation and the management of its competitive pressures do not in themselves dictate any particular settlement of the social and economic forces in play. Nor do they generate a single, determinate set of legal relations surrounding work and production.⁴

Whatever the reasons to investigate the logics undergirding capitalism and the diversity as well as the regularities in the institutional forms through which capitalist relations are expressed across space and time, no such general theory, such as those informed by Marxism, about those logics and relations is required to ground legal analyses that place now-marginal and excluded forms of labour directly in relation to the market work that is the ‘normal’ subject of concern within political economy.⁵

The argument advanced here is rather that an assessment of legal norms and institutions that organise *all* work – how they ‘constitute’ productive spaces and relations, how they configure bargaining power over the terms of work, what those legally-enabled powers enable in the way of the capture and use of resources – may provide a relatively direct way, not simply to assess the location and contribution of different forms and sites of labour to ‘the economy’ but to observe how the relative status of different groups of workers moves in one direction or the other. Still more,

²E Gould and M Hassa, *Low Wage, Low Hours Workers were Hardest hit in the COVID-19 Recession: The State of Working America employment report 2020* (Economic Policy Institute May 2021) <<https://files.epi.org/uploads/224913.pdf>>. D Ashiagbor, ‘Race and Colonialism in the Construction of Labour Markets and Precarity’ 50 (2021) *Industrial Law Journal* 506.

³See for example C Arruzza, T Bhattacharya and N Fraser, *Feminism for the 99 Percent: A Manifesto* (Verso 2019); N Fraser, *Cannibal Capitalism: How Our System is Devouring Democracy, Care, and the Planet – And What We Can Do about It* (Verso 2022).

⁴K Klare, ‘Law Making as Praxis’ 40 (1979) *Telos* 123.

⁵Nor, however, does attention to legal norms and institutions foreclose consideration of their relation to capitalism; see for example S Deakin et al, ‘Legal Institutionalism: Capitalism and the Constitutive Role of Law’ 45 (2017) *Journal of Comparative Economics* 188. Law’s relationship to capitalism, along with capitalism’s impact upon democracy, is a central topic of interest in the resurgent Law and Political Economy movement in the United States. See, for example, B Rogers, ‘Capitalist Development, Labor Law, and the New Working Class’ 131 (2022) *Yale Law Journal* 1842; J Britton-Purdy et al, ‘Building a Law- and-Political-Economy Framework: Beyond the 20th Century Synthesis’ 129 (2020) *Yale Law Journal* 1784.

analysing the legal scaffolding of work, its diffuse sources and their complex interactions, may provide a way to see how work itself materialises and dematerialises, both gaining and losing value through processes of legal and institutional reform

The further intuition is that, at present as in the past, moments of social and political transformation may be catalysts not just to the transformation of legal institutions but to changes in settled modes of legal analysis and legal consciousness as well. At least that would be the question.

2. The (destabilised) legal/economic context

So what is that ‘sense of an ending’ when it comes to contemporary political economy, at least as experienced in the collective North/West? Numerous analysts have indicated the approaching or already realised end of the current politico-legal settlement,⁶ along with the erosion and deconsolidation of the regulatory or governance paradigm that has dominated since the end of the post-war Golden Age, neoliberalism.⁷ While its force is far from exhausted – many key elements remain institutionally entrenched, and no obvious successor is yet on the horizon – as a route to economic growth compatible with democracy, this paradigm is weak or failing at multiple levels: descriptive, ideological, normative, and practical. Wolfgang Streeck has ascribed these failures to the splitting of capitalism from democracy, the ‘de-democratization of capitalism through the de-economization of democracy’.⁸ More than 10 years ago, Dani Rodrik identified the inherent tension in the simultaneous pursuit of globalisation, sovereignty, and democratic politics.⁹ Scholars of international law and law and development have, for their part, observed the pernicious effects of this governance paradigm on Third World states for over a generation, linking that paradigm to colonial practices of old, while decrying the institutions that have advanced it,¹⁰ suggesting the crisis has been with us for a while.

Apart from recurrent financial and economic crises themselves, the most salient evidence of this breakdown may be the economic inequality that is growing everywhere, to a point now recognised as politically destabilising rather than merely socially undesirable.¹¹ One telling observation is that in the wake of stagnant growth rates, we are at a moment in which, put at its simplest, capital accumulation ‘is now less about *making anything* and more about simply *owning something*’.¹² Funds flow to safety rather than greenfield investment or innovation at the level of products, services, and processes, driving asset-price inflation and the monopolisation of goods and services – think of the rising price of urban land and housing, or the cost of access to now-essential technology and digital information services. The result is an economy which, far from creating a rising tide that lifts all boats, grants to owners formidable opportunities to capture monopoly rents, while producing a zero-sum struggle over the distribution of gains.¹³ Whatever else might be said, these developments are not in accordance with the classic defences of market-centred, private-sector driven economies. However complex and contested the underlying dynamics, what

⁶A Tooze, *Shutdown: How Covid Shook the World's Economy* (Viking 2021); W Streeck, *Buying Time: The Delayed Crisis of Democratic Capitalism* (2nd edn, Verso Books 2017); W Streeck, *How Will Capitalism End?* (Verso Books 2016).

⁷C Crouch, *The Strange Non-Death of Neoliberalism* (1st edn, Polity 2011); JE Stiglitz, ‘Is There a Post Washington Consensus Consensus?’ in N Serra and JE Stiglitz (eds), *The Washington Consensus Reconsidered: Towards a New Global Governance* (Oxford University Press 2008) 41–56.

⁸Streeck, *Buying Time: The Delayed Crisis of Democratic Capitalism* (Verso Books 2017) 5.

⁹D Rodrik, *The Globalization Paradox: Democracy and the Future of the World Economy* (WW Norton 2012).

¹⁰B Chimni, ‘International Institutions Today: A New Imperial State in the Making?’ 15 (2004) *European Law Journal* 1; A Anghie, ‘Time Present and Time Past: Globalization, International Financial Institutions and the Third World’ 32 (2000) *New York University Journal of International Law and Politics* 243.

¹¹JE Stiglitz, *The Price of Inequality: How Today's Divided Society Endangers Our Future* (Norton 2012); A Tooze, *Crashed: How a Decade of Financial Crises Change the World* (Penguin 2018) Introduction.

¹²JM Zacaes, ‘Euphoria of the Rentier?’ 129 (2021) *New Left Review* 48.

¹³B Christophers, *Rentier Capitalism: Who Owns the Economy, and Who Pays for It?* (Verso 2020); A Benanav, *Automation and the Future of Work* (Verso 2020); Zacaes (n 12) 57.

are no longer in dispute are the severely concentrated outcomes, especially within industrialised economies. The gains from economic growth now reach a declining part of the population; indeed, in many states, the majority are excluded almost entirely, as those at the very top capture the lion's share.¹⁴ Workers, in general, are losing, as wages form a decreasing proportion of the profits realised in production and service delivery worldwide.¹⁵ Here, Jacobs and Mazzucato identify three distinct trends: 'the total share of labour (salaries and wages) in overall output has fallen, earnings have not kept pace with gains in productivity and the distribution of the reduced labour share has become more unequal'.¹⁶ Private debt has exploded during the same time, facilitated by financial innovation and lax lending practices¹⁷ associated with the financialisation of the economy and fueled by the growing gap between flat or falling incomes and rising household expenditures on housing, medical care and education. Among workers, the winners and losers are further distributed along lines of race and gender as well as class.

What makes these events and phenomena matters of legal interest and analysis is that all have a normative and institutional infrastructure, one that constrains and enables their unfolding over time and space. Moreover, recurring crises have revealed the extent to which macro-level decisions concerning economic and financial governance are connected to micro-level outcomes. Yet we know less than we should about the role of this infrastructure, at all levels, in the (re)organisation of economic and social processes and relations. Is the form or use of that infrastructure changing in important ways, and if so, where and how? Can we use, or develop, legal analyses to shed light on the politico/economic transformations now underway, including to better trace the flows of resources and labour within the economy?

One strategy is simply to expand the range of legal institutions under consideration; one point of entry here concerns macroeconomic governance, the shifting relationship between fiscal and monetary policy in particular.

The legal analysis of macroeconomics, as opposed to microeconomics, remains largely a work in progress.¹⁸ Microeconomics, the subject of law and economic analysis, has been profoundly influential not only within legal scholarship in the era of neoliberal governance but in transforming adjudicative norms and practices within the United States;¹⁹ its significance within EU competition policy, has been noted as well.²⁰ Macroeconomics, by contrast, barely exists as a subject of legal analysis within the Anglo-American tradition, whether in mainstream or critical legal thought.²¹ Yet it is of undoubted importance, as it involves 'politically salient' issues such as employment, inflation, and growth, and engages multiple legal regimes involved in 'constructing actors and markets and mediating the relations among them'.²² In short, macroeconomic governance touches on legal questions of central interest, despite its marginal place within contemporary legal analysis.²³

¹⁴B Milanovic, *Global Inequality: A New Approach for the Age of Globalization* (Harvard University Press 2016); F Alvaredo et al, 'The Elephant Curve of Global Inequality and Growth' (December 2017) <<https://wid.world/document/elephant-curve-global-inequality-growth-wid-world-working-paper-2017-20/>>; Tooze, *Shutdown* (n 6).

¹⁵B Milanovic, *Capitalism, Alone: The Future of the System That Rules the World* (Harvard Belknap 2019) 15. Milanovic among others attributes this development to labour's declining bargaining power; *Capitalism Alone*, 21.

¹⁶M Jacobs and M Mazzucato, 'Rethinking Capitalism: An Introduction' in M Jacobs and M Mazzucato (eds), *Rethinking Capitalism: Economics and Policy for Sustainable and Inclusive Growth* (Wiley-Blackwell 2016).

¹⁷A Mian and A Sufi, *House of Debt: How They (and You) Caused the Great Recession, and How We Can Prevent It from Happening Again* (University of Chicago Press 2014).

¹⁸A Gelpern and A Levitan, 'Considering Law and Macroeconomics' 83 (2020) *Law and Contemporary Problems* i.

¹⁹For a discussion of its outsized influence, see Britton-Purdy et al, 'Building a Law- and-Political-Economy Framework: Beyond the 20th Century Synthesis' (2020) *Yale Law Journal* 1784.

²⁰PF Kjaer, 'The Law of Political Economy: An Introduction' in P Kjaer (ed), *The Law of Political Economy: Transformation in the Function of Law* (Cambridge University Press 2020) 1–30.

²¹Macroeconomics does however form an element of ordoliberal thought. See Kjaer, 'The Law of Political Economy: An Introduction' (2020).

²²Gelpern and Levitan, (n 18) iii.

²³D Kysar, 'Sustainability, Distribution and the Macroeconomic Analysis of Law' 43 (2005) *Boston College Law Review* 1.

A focus on macroeconomic policy is particularly useful in conversations about transformations in law in conjunction with shifts in political economy, as it provides a window on the deconsolidation of key norms about economic governance, especially since the immediately preceding global financial crisis, as well as the rising significance of monetary policy decisions to political controversies and flashpoints such as the distribution of wealth and income.

The independence of central banks and the defence of their remit to establish monetary policy in the service of price stability independent of quintessentially ‘political’ fiscal objectives is an article of faith; indeed, it is one of the touchstones by which good economic governance, or its absence, is now conventionally identified.²⁴ As with other putatively technocratic forms of governance, the distinction between politics and expertise plays a central legitimating role:²⁵ underwriting this independence are claims about what goes merely to questions of efficient, professional management of the economy versus what falls within the domain of politics or discretion, otherwise known as contestable democratic choice. Yet the idea that monetary policy is purely, and properly, a matter of technocratic expertise has become progressively less sustainable. A hallmark of the response to the pandemic is a substantial erosion of the distinction between monetary and fiscal support of the economy and, by extension, a blurring of the respective institutional roles and mandates of governments and central banks.²⁶ Governments everywhere have spent massively to shore up their economies, via subsidies and supports to financial institutions, businesses, workers, and households, as the pandemic disrupted economic life and activity in unprecedented ways. While that support itself is not surprising given the scale of the crisis, the form it has taken is. Across the industrialised world, central banks have been buying up the government debt issued to fund those expenditures at a prodigious rate.²⁷ In jurisdictions such as the US, the UK and the EU, corporations have had direct access to central bank funds as well,²⁸ unfolding in real time a display of the deep intermingling of the political and technocratic, the public and the private.

The shift at the European Central Bank (ECB) is particularly noteworthy. Relatively early in the pandemic, the ECB announced a significant increase in the purchase of government and corporate debt, a program belatedly begun in 2015 in response to the earlier Euro sovereign debt crisis. In a reprise with a difference, this time the commitment to do, in former ECB President Mario Draghi’s famous words, ‘whatever it takes’ to stabilise the Euro and the markets took a form that had been ruled completely out of order just a short time ago: the ECB issued its own bonds, thus effectively providing a degree of sharing of fiscal burdens across the Eurozone that previously had proved elusive.²⁹ In the name of recovery, the ECB along with the European Commission through its creation of the NextGenerationEU Recovery plan³⁰ jointly supported a debt-funded fiscal

²⁴For a recent defence of central bank independence, see P Tucker, ‘On Central Bank Independence’ (Finance and Development May 2020) <<https://www.imf.org/external/pubs/ft/fandd/2020/05/paul-tucker-unelected-power-on-central-bank-independence.htm>> accessed on 9 November 2022.

²⁵D Kennedy, *A World of Struggle: How Power, Law, and Expertise Shape Global Political Economy* (Princeton University Press 2016).

²⁶Indeed, current practice has been described as a ‘merger’ of fiscal and monetary policy. See Tooze, *Shutdown* (n 6).

²⁷These purchases reportedly reached \$18 trillion by the end of 2020 alone. See Tooze, *Shutdown* (n 6) 141–2.

²⁸For a discussion of these initiatives, see Tooze, *Shutdown* (n 6), chapter 7, Economy on Life Support.

²⁹The extent of fiscal sharing should not be overstated. The programs represent far less than the fiscal union and significant budgetary centralisation that has been identified as the necessary counterpart to a well-functioning monetary union. See R Mundell, ‘A Theory of Optimal Currency Areas’ 51 (1961) *American Economic Review* 657; P de Grauwe, *The Economics of Monetary Union* (7th edn, Oxford University Press 2007) 291. The next best alternative, flexibility in national fiscal policies, is also normally unavailable under EU rules; see F Scharpf, ‘Monetary Union, Fiscal Crisis and the Preemption of Democracy’ (2011) MPIfG Discussion Paper, No. 11/11.

³⁰‘Recovery Plan for Europe’ (Official Website of the European Union 17 December 2020) <https://ec.europa.eu/info/strategy/recovery-plan-europe_en> accessed 23 October 2022.

program for Europe as a whole. Although the immediate provocation was the destabilisation of markets, in particular the worryingly high price of government issued debt in Italy, such exceptional measures, like those relaxing fiscal constraints, may prove difficult to limit or end; whatever their fate after the pandemic, they have significantly undercut the norm of central bank independence.³¹

Apart from raising constitutional questions about how, and whether, all this new institutional activity can be justified,³² the capacity of central banks to mobilise enormous funds not only to stabilise markets but to assist in the alleviation of financial hardship of populations and enterprises signals a disruption to prevailing governance norms and practices, if not necessarily a change in fundamental governance objectives. The decision to extend credit, and in some cases outright grants, to corporations and other commercial entities has also given rise to questions of obvious political nature, such as ‘who was supported and how’.³³ As central banks now move to bring asset-price inflation under control, conflicts *within* the private have come to the fore, with the conflict between labour and capital emerging as a crucial fault line as tighter monetary policy is pursued at the expense of jobs and economic growth. These extraordinary interventions have also provoked speculation about the availability of such funds for broader social purposes, such as a universal basic income with which pandemic social support has been compared.³⁴ In light of the myriad undeniable interconnections between public support and enterprise success and even survival, the underlying ideology concerning the ‘private’ character of market relations is surely once again in play

One question must now be what further shifts those changed governance practices might catalyse.

At the same time, the pandemic and the responses to its disruptions have placed in unparalleled view connections between what goes on inside the market and what goes on at its margins or beyond it altogether. A salient feature of the pandemic policy response was the financial support extended directly to households as well as to businesses. This support reflects the tight interconnections between the family and the market and, at the limit, the impossibility of stabilising the economy without providing demand-side support to workers and to households when catastrophic declines in consumption threaten. The financial programs that were rolled out by central banks during the pandemic may have been unprecedented. But they were, in part, a response to what had become undeniable, confirming what was already observable in the financial crisis of 2008–9: This is that there are constant feedback loops between households and markets. Decisions and activities in one domain directly impact the other; indeed, events in one are quite likely to provoke transformations in the other.³⁵ The management of these interconnections and dynamics, moreover, turns out to be key to both the plight of the losers and to the fortunes of the winners. This should not surprise us, as there is long historical precedent, both for such parallel transformations and for the questions of distributive justice they engender.

³¹For a discussion, see Tooze, *Shutdown* (n 6) 183.

³²The German Federal Constitutional Court initially ruled that in failing to challenge the ECB’s bond-buying initiatives carried out under its newly instituted Public Sector Purchase Plan, the Federal Government had violated the complainants’ rights under the German Basic Law by failing to assess and establish that the purchases met the principle of proportionality. See BVerfG, Judgement of the Second Senate of 5 May 2020 – 2 BvR 859/15 [1] – [237].

³³Tooze, *Shutdown* (n 6) 12.

³⁴It has been suggested that the pandemic support programs themselves constitute a natural experiment in universal basic income (UBI). See A Van Hootegem et al, ‘A Wave of Support? A Natural Experiment on How the Covid-19 Pandemic Affected the Popularity of a Basic Income’ *Acta Politica* (September 9 2022) <<https://doi.org/10.1057/s41269-022-00260-9>>. For a discussion of the basic parameters of UBI, see EO Wright in B Ackerman et al (eds), *Redesigning Distribution: Basic Income and Stakeholder Grants as Cornerstones for an Egalitarian Capitalism* (Verso Books 2006).

³⁵For a discussion of this process of interaction in the context of the Global Financial Crisis, see K Rittich, ‘Families on the Edge: Governing Home and Work in a Globalized Economy’ 88 (2010) *North Carolina Law Review* 1527.

3. At the margins of the market: unpaid work and informality

Here I investigate two sites or frontiers of production that might form part of a broader inquiry into law and political economy going forward: unpaid labour and informal markets. Rather than distinct, these sites are interrelated; both, moreover, turn out to be foundational to the organisation of work and the operation of labour markets in contemporary market-centered polities.

As I shall suggest, what is required to bring these sites more fully into the conversations around political economy is a shift in the conceptualisation of their governing legal orders, as well as the relation of those orders to those of the market. Although we typically approach regulatory issues through the legal regimes that seem most directly applicable to the subject or issue at hand, investment in the autonomy of those regimes and the efficacy of their norms and institutions can pose a barrier at the practical as well as analytic levels. For it turns out that work and labour markets are regulated not only by property and contract law as well as labour standards; they are also regulated by family law and a wide range of other laws too. And if labour market relations bear the negative imprint of family law and family relations, the converse is also true: the laws that enable the organisation of work and production are likely to affect the nature of the activities undertaken within the household and the economic risks assumed by its members. This interconstitutive relationship suggests a proposition with more general application, to the analysis of work and to broader questions of distributive justice: legal rules do not remain securely attached to their putative objects, nor can their effects be confined to them; instead, they combine and interact in both predictable and varied ways. In general and in specific contexts, we may need to trace the operations of a broad range of legal rules, both to understand what effectively regulates markets and households and to analyze their impact on the persons and projects that are affected.

4. Paid versus unpaid work

It is well recognised that in tandem with the industrial revolution came the emergence of an economy in which the organisation and allocation of labour was dominated by markets in labour.³⁶ Less frequently remarked is that this progressive commodification of labour provoked a revaluation – and devaluation – of work itself. Indeed, it changed the very understanding of work, through a distinction imposed upon formerly unclassified activities in which some forms of labour were recognised as ‘productive’ while others were deemed merely ‘reproductive’. This distinction largely tracked the gendered division of labour and produced a new population of workers: unproductive housewives.³⁷ A collateral effect was the apparent extrusion of productive activity from the household entirely, to wit, as between waged workers and unpaid domestic workers, a conflation of economic activity with engagement in the market *simpliciter*.³⁸

However successful at the ideational as well as material levels, in this reconstruction the economic role of the family was merely obscured, not eliminated. Due to its ongoing, and immense, significance, the recovery and exposition of the labour of care and other forms of non-market work is a longstanding preoccupation within feminist economics, social theory, and labour history.³⁹ Refracted through different political and theoretical lenses – principally socialist, Marxist,

³⁶This development was part of the commodification of land, labour and money, processes analyzed by social theorists such as Marx, Weber and Polanyi. See for example K Polanyi, *The Great Transformation: The Political and Economic Origins our Out Time* (Beacon 2001); EP Thompson, *The Making of the English Working Class*, V Gollancz (ed) (Monthly Review Press 1963).

³⁷N Folbre, ‘The Unproductive Housewife: Her Evolution in Nineteenth-Century Economic Thought’ 16 (1991) *Signs* 441.

³⁸Thus, the ‘economy’, a term which originally referred to the oikos or household, in the course of modernisation came to refer the market alone. See J Halley, ‘What Is Family Law?: A Genealogy, Part I’ 23 (2011) *Yale Journal of Law and the Humanities* 1.

³⁹M Reid, *Economics of Household Production* (First Published 1934, Forgotten Books 2018); M Waring, *If Women Counted: A New Feminist Economics* (First Published 1988, HarperCollins 1990); D Elson, ‘Labor Markets as Gendered Institutions: Equality, Efficiency and Empowerment Issues’ 27 (1999) *World Development* 611.

anti-colonial, and racial capitalist – analysts and activists alike have highlighted the massive distributive inequities arising from the unequal allocation of the obligations of unpaid labour among women and men, in tandem with the systematic under- or non-valuation of care work itself. For example, Selma James and Mariarosa Dalla Costa both placed unpaid housework at the centre of gender injustice worldwide, identifying it as central to the creation and maintenance of the labour force and thus to modern capitalism itself;⁴⁰ Sylvia Federici did the same,⁴¹ over a long historical arc.⁴² Selma James and Evelyn Nakano Glenn have traced such misallocations and inequities along racial lines, thereby linking the status of those who provide care, paid as well as unpaid, not only to capitalism but to the legacies of colonialism.⁴³ Economist Ingrid Palmer called unpaid work obligations an effective ‘tax’ on women’s labour market participation.⁴⁴ A proper list of interventions and contributions to debates about unpaid labour within modern economies would continue for much longer. In short, there are histories of activism and archives of disciplinary research that have long been available as analytic resources and catalysts to the reconstruction of mainstream paradigms concerning work.

The valuation of unpaid work is not an insoluble conundrum at the conceptual level even within mainstream economic paradigms; whether care should be considered part of the ‘productive’ economy is the subject a longstanding debate within neoclassical economics itself.⁴⁵ Just as waged labour is only a part of the world of work, it is recognized that what trades in the market is but a subset of the economy as a whole; there are, moreover, well-established methods for imputing the economic value of non-traded goods and services into national and other accounts. Yet compelling arguments to the contrary, household care work is not generally included among them.⁴⁶ The net effect of the decision to exclude care from the domain of production is to distort our sense of the nature, size, and dynamics of the economy itself; its practical effect is to permit, indeed to encourage, reliance on unpaid work as if it were an inexhaustible resource. Thus, unpaid care raises questions that seem pertinent, indeed pressing, with respect to other uncommodified resources: Under what assumptions or conditions is such reliance possible? To what extent is it sustainable? What would we see if we traced the uses of such resources more fully? On whom do the costs and benefits fall? Etcetera.

Nonetheless, at least until the pandemic, the imprint of these issues on the governance of labour and the economy can be described as marginal at best. Where unpaid work does surface as a concern, it is typically in conjunction with the cultivation of human capital or labour market activation policies directed at women; at this point, general norms about good economic governance including concerns about the effects of ‘burdensome’ labour market institutions on economic growth often prevail, notwithstanding countervailing interests in gender equality.⁴⁷

In the Global South, the progressive commodification of non-market spaces and resources, the labour of women included, continues simply as part of mainstream policy for modernisation and development, its consequences axiomatically beneficial for the economy and for women. Within

⁴⁰M Dalla Costa and S James, *The Power of Women and the Subversion of Community* (Falling Wall PR 1975); S James, *Sex, Race and Class: The Perspective of Winning: A Selection of Writings, 1952–2011* (PM Press 2012) 43.

⁴¹S Federici, *Revolution at Point Zero: Housework, Reproduction, and Feminist Struggle* (PM Press 2012).

⁴²S Federici, *Caliban and the Witch: Women, the Body and Primitive Accumulation* (Autonomedia 2004).

⁴³S James, *Sex, Race and Class: The Perspective of Winning: A Selection of Writings, 1952–2011* (2012); E Nakano-Glenn, *Forced to Care: Coercion and Caregiving in America* (Harvard University Press 2010).

⁴⁴D Elson, ‘Labor Markets as Gendered Institutions: Equality, Efficiency and Empowerment Issues’ 27 (1999) *World Development* 611; I Palmer, ‘Public Finance from a Gender Perspective’ 23 (1995) *World Development* 1981.

⁴⁵M Mazzucato, *The Value of Everything: Making and Taking in the Global Economy* (Public Affairs 2018), chapter 3, ‘Measuring the Wealth of Nations’ 80–1.

⁴⁶See D Ironmonger, ‘Counting Outputs, Capital Inputs and Caring Labor: Estimating Gross Household Product’ 2 (1996) *Feminist Economics* 37; M Waring, *If Women Counted: A New Feminist Economics* (First Published 1988, HarperCollins 1990).

⁴⁷K Rittich, ‘Equity or Efficiency: International Institutions and the Work/Family Nexus’ in J Conaghan and K Rittich (eds), *Labour Law, Work and Family: Critical and Comparative Perspectives* (Oxford University Press 2005) 43–76.

industrialised and post-industrial economies, the focus has been on accommodating family obligations within the demands of labour in the market and achieving work/life ‘balance’, through attempts to facilitate individual choice and ‘flexibilize’ work relations that, leaving underlying work structures mostly intact, still impose economic costs on those who do unpaid work.⁴⁸ This endeavor has been pursued almost exclusively through the possibilities that seem to be available through labour and social protection law, for example, in the form of entitlements to modified hours of work and leave, paid or unpaid, and access to income replacement through employment insurance schemes and the provision of child benefits. Tied as they are to employment status, itself a precious commodity in the new economy, such entitlements are now frequently unavailable even to those who labour in the market. None requires any fundamental reconceptualisation of family/market relations, such as recognising the household itself as a site of productive activity, one critical to the operation of other domains of economic activity. Nor is there any requirement that employers or other market actors consider the consequences of their decisions on household labour and resources. Finally, even in the face of partial recognition of the costs of unpaid work, still disproportionately borne by women, no policy or regulatory initiative recognises the other side of the equation: there is, of necessity, a panoply of beneficiaries from this labour beyond the household, many of whom at present are getting a free ride, as it were.

Yet even mainstream scholars of social welfare have observed the unstable equilibrium flowing from the feminisation of the paid labour force in tandem with the maintenance of a domain of social reproduction that remains largely privatised and unremunerated.⁴⁹ The pandemic has now revealed that model to be, at the limit, unsustainable as well, even for those whose primary concern lies in the undisturbed continuation of market activity.

In the aftermath of the global financial crisis, economists pointed out the folly of measuring the economy via standard indicators of market activity, the primary measure being Gross Domestic Product (GDP); still more, they suggested the problems of using such measures as proxies for the growth – and health – of the economy itself.⁵⁰ As they pointed out there is no reason to assume simply because more goods or services are purchased rather than directly produced and consumed that there has been an *increase* in economic activity; still less is it safe to link the commodification of those goods and services to welfare gains. These observations, while directed in the first instance at developing economies, are equally pertinent to processes of commodification and de-commodification within economies that are already industrialised. Beyond massive blind spots concerning the nature and extent of economic activity itself, such measurement practices suggest the possibility of systematic slippages in the accounting of benefits and losses within and across different spaces of productive activity, as when resources or services move from governments to the private sector⁵¹ – or across the market/non-market divide. Thus, these insights can be applied fairly directly to the analysis of unpaid work.

The pandemic has shone new light on the intimate relationship between paid and unpaid work, revealing the extent to which seemingly discrete sites, forms and obligations of labour are routinely entangled in peoples’ daily working lives, and positioning a wider range of actors than usual to observe the highly unequal distribution of benefits, costs, and risks experienced by different groups at work. Put at its most blunt, the disruptions to normal work, school and daycare arrangements have forced a general acknowledgement of the labour involved in the care and supervision of children, the ill and the elderly, a ‘revelation’ that has occurred primarily because such work necessarily disrupts, and at some point displaces, the capacity to do paid work; hence, the so-called

⁴⁸J Conaghan and K Rittich, ‘Introduction: Interrogating the Work/Family Divide’ in J Conaghan and K Rittich (eds), *Labour Law, Work and Family: Critical and Comparative Perspectives* (Oxford University Press 2005) 1–16.

⁴⁹G Esping-Andersen, *The Incomplete Revolution: Adapting Welfare States to Women’s New Roles* (Polity 2009).

⁵⁰JE Stiglitz et al, *Mismeasuring Our Lives: Why GDP Doesn’t Add Up* (The New Press 2010).

⁵¹See also Mazzucato (n 45) chapter 3, ‘Measuring the Wealth of Nations’.

'she-cession', the departure of disproportionate numbers of women from the labour force visible across so many economies during the pandemic.⁵²

It was already recognised well before the pandemic, by theorists of welfare as well as feminists, that one of the keys to unlocking this puzzle lies with the transformation of the male breadwinner norm undergirding employment law and policy.⁵³ As long as market work remains organised around the assumption that workers are fundamentally unencumbered, or that they have few obligations that cannot be subordinated to the demands of paid work, those who do unpaid work will remain at a structural disadvantage within competitive labour markets.⁵⁴

For scholars of law and political economy, the question is whether there is a way to tell the story that retains a central role for legal norms and institutions in the unfolding of social and economic relations at work, yet moves the conversation beyond the restricted domains of labour law and social security where it classically resides and, in addition, links unpaid labour to central questions of economic and political justice.

The starting point is simply to reiterate that unpaid care work is economically valuable labour. Established conventions to ignore it aside,⁵⁵ there is no real debate at this point that such work is itself productive, and that it contributes in multiple ways to production within the market economy as well.⁵⁶ This alone suggests that the restriction of attention to labour that is waged or 'priced' is at best limited and, depending on the issue or parties involved, might be problematic.

The second point is that distinctions in the status and value of various forms of work are neither natural nor 'merely cultural'. As critical analyses of the constitutive and distributive properties of law have long established, markets are made not found, with varying possibilities for the powers, position and outcomes of the actors involved turning on the choices that are made about the design of legal institutions and the application of legal rules.⁵⁷ Thus, the nature and value of different forms of work can be seen as constructed, or co-constituted, by law. This is a dynamic process, moreover, that unfolds through the conjunction of technological and economic developments with legal institutions, norms and practices.⁵⁸

For purposes such as the development of systems of national accounting, distinctions among productive activities, and the disparate value attached to those activities that results, is often a consequence of institutional decisions and disciplinary practices in the fields of statistics and economics.⁵⁹ Yet at a more foundational level, such distinctions are secured through the operation and effects of legal rules, norms, and doctrines. And as is the case in other disciplines, the legal forms which provide the institutional basis of work relations are a product of political determinations and ideological commitments as well as professional practice. For example, rather than a purely technical device, the public/private distinction, a central organising principle in legal thought, works to naturalise the family as the locus of care, to distinguish household care work from other types of work, and to underwrite the legitimacy of legal arrangements allocating

⁵²The She-cession, NC Mason, Institute for Women's Policy Research <<https://ohioline.osu.edu/factsheet/cdfs-4110>>.

⁵³G Esping-Andersen, 'Towards a Postindustrial Gender Contract' in P Auer and B Gazier (eds), *The Future of Work, Employment and Social Protection: The Dynamics of Change and the Protection of Workers* (International Labour Organization 2002) 109–128; N Fraser, 'After the Family Wage: Gender Equity and the Welfare State' 22 (1994) *Political Theory* 591.

⁵⁴For a collection of essays surveying this structural disadvantage, see J Conaghan and K Rittich (eds), *Labour Law, Work and Family: Critical and Comparative Perspectives* (Oxford University Press 2005).

⁵⁵Mazzucato (n 45) chapter 3, 'Measuring the Wealth of Nations'.

⁵⁶D Ironmonger, 'Counting Outputs, Capital Inputs and Caring Labor: Estimating Gross Household Product' (1996).

⁵⁷For a summary review of these properties, see DM Davis and K Klare, 'Critical Legal Realism in a Nutshell' in E Christodoulidis, R Dukes and M Goldoni (eds), *Research Handbook on Critical Legal Theory* (Elgar 2019) 27–43.

⁵⁸The basic structure of this process is described in S Jasanoff, 'The Idiom of Coproduction' in S Jasanoff (ed), *States of Knowledge: The Co-Production of Science and the Social Order* (Routledge 2004) 3. For a recent collection of essays exploring this process across a variety of legal fields, see 'Debate: Legal Constitutions of Value', *Verfassungsblog* (March 9, 2020) <<https://verfassungsblog.de/category/debates/constitutions-of-value-debates/>>.

⁵⁹Mazzucato (n 45) 76.

responsibility for the delivery of care that, in its absence, might otherwise draw closer scrutiny – and require further justification.⁶⁰

If the status and value of work are made not found, then private law is one the tools of their fabrication. Notice first that within Western legal systems, civilian as well as common law, the law governing the family is separate and conceptually distinct from the private law that organises the market.⁶¹ This distinction is intimately connected to the invisibility of the household as a site of production and its consequent neglect in matters of political economy. Yet this distinction was not inevitable; indeed, it did not always exist in its current form. As Janet Halley notes when tracking the evolution of domestic relations and their emergence as family law within the United States, legal relations within the household moved in the opposite direction to that proposed by Henry Maine.⁶² From its origins in civil contract, marriage became more status-like in its attributes and legal integuments in the process of modernisation, and thus more easily and sharply distinguished from market relations in its logics and essential properties.⁶³ At least so we now think.

A prime element or event in the constitution of family law was the excision of the legal relation of master and servant from the law of the household and its relocation in the world of contract and commercial relations. This distinction, in turn, reinforced the market as the locus of labour, with contract as its organising sign and force. The laws governing work played their own role in this process, shoring up the now-common sense that ‘labour’ means work in the market. In common law jurisdictions, out of the disparate rules covering the work relations that populated home and market a general law of employment consolidated over time,⁶⁴ with master and servant law as its basis.⁶⁵ While in the United States the rule that emerged was ‘employment at will’, in other jurisdictions, England and Canada for example, the contract of employment retained some of its feudal elements, namely obligations of fidelity, good faith, and obedience on the part of the employee; for this reason, Kahn-Freund described the field of labour law as essentially ‘an attempt to infuse law into a relation of command and subordination’.⁶⁶ Thus was the productive function of the household obscured within family law at the same time, and through linked legal developments, as hierarchical relations became normalised within ‘free’ contracting in the market for labour.⁶⁷

Here, surfaces the importance of the foundational (critical) insight concerning the constitutive role of law.⁶⁸ Changes to the legal architecture governing *both* households and markets were as pivotal to the production of the non-economic household as to the creation of the waged labour force. Indeed, they can be imagined as fundamentally a single process: the legal constitution of the market was, at the same time, the (re)constitution of its outside, the household, as an uneconomic space, one in which exchanges of labour and resources, except at the point of dissolution of marriage, were not normally subject to legal oversight at all.⁶⁹ Working in tandem, the regimes governing households and markets served, *inter alia*, to redivide and reshape social and economic

⁶⁰FE Olsen, ‘The Family and the Market: A Study in Legal Ideology’ 96 (1983) Harvard Law Review 1497; see also KE Klare, ‘The Public/Private Distinction in Labor Law’ (1981–82) University of Pennsylvania Law Review 1358.

⁶¹J Halley and K Rittich, ‘Critical Directions in Comparative Family Law: Genealogies and Contemporary Studies of Family Law Exceptionalism’ (Introduction to the Special Issue on Comparative Family Law) 58 (2010) American Journal of Comparative Law 753; see also D Kennedy, ‘Savigny’s Family/Patrimony Distinction and Its Place in the Global Genealogy of Classical Legal Thought’ 56 (2010) American Journal of Comparative Law 811.

⁶²HS Maine, *Ancient Law* (First Published 1861, Cosimo Classics 2005).

⁶³Halley (n 38) 1.

⁶⁴This is a process that unfolded over a long period of time; the emergence of the category now recognised simply as ‘employment’ did not consolidate until well into the 20th century. See S Deakin, ‘The Many Futures of the Contract of Employment’ in J Conaghan (ed) et al, *Labour Law in an Era of Globalization* (Oxford University Press 2004) 177–196.

⁶⁵RJ Steinfeld, *Coercion, Contract, and Free Labor in the Nineteenth Century* (Cambridge University Press 2001).

⁶⁶P Davies and M Freedland, *Kahn-Freund’s Labour and the Law* (3rd edn, Stevens and Sons 1983) 81.

⁶⁷For a critique of the distinction between free and coerced labour in the US and the UK, see Steinfeld (n 65).

⁶⁸Kennedy ‘Savigny’s Family’ (n 61).

⁶⁹J Halley, ‘What Is Family Law? A Genealogy, Part II’ (2011) 189, 289.

spaces *and* to remake our sense of their character and value, evacuating the household of its (apparent) productive functions and reconstituting the market as the site of economic activity and value *tout court*.

More recent examples of this mutually constitutive relationship between family and market are at hand, examples, moreover, that demonstrate the range of possibilities that legal arrangements may alternatively foreclose or bring into being. A host of legal reforms modifying the operating conditions of enterprises were the vehicle by which previously socialised ‘reproductive’ costs were normatively and practically resituated within households in the states in ‘transition’ from plan to market economies in the wake of the Cold War.⁷⁰ Although conventionally styled ‘privatization’, this process in fact involved further determinations about *which* private actors should bear such costs, namely, families and individuals rather than firms or employers. While reforms were fueled by assertions about normal, and necessary, practice within market economies,⁷¹ they were also backstopped by pre-critical conceptions of law that naturalised the protection of private law rights⁷² and simultaneously exceptionalised a host of administrative and regulatory ‘interventions’ in market processes,⁷³ especially those concerning labour markets.⁷⁴ Heavy traffic in the maintenance of a distinction between regulation and the protection of fundamental rights legitimated the placement of extensive powers in the hands of owners and enterprise managers; unsurprisingly, they used those powers to reorganise enterprise functions and reduce costs in ways that silently expanded the domain of unpaid work and with it, the zone of household or family responsibility.⁷⁵ In addition to facilitating an immense transfer of resources as well as economic and financial risk, these redrawn conceptual and institutional boundaries obscured connections between labour in the home and in the world of production that had previously been well-recognised, all the while redirecting flows of labour and resources so that more moved from the household to the market.⁷⁶

Rehearsing such historical events makes their ‘ideological investments discernable and available for resistance’,⁷⁷ thus a front of struggle in a transformed analysis of political economy. It also serves as a reminder that, going forward as in the past, questions of legal classification and form will occupy a central place in the recognition and valuation of labour in its diverse forms and locations.

While the properties and value assigned to different forms of work can be relatively durable or ‘sticky’, it is also the case that they are continually undergoing transformation. Although unusually visible at points of sharp political and economic transition, this making and unmaking, and valuing and devaluing, of labour occurs through decisions at the policy and enterprise level, routine and exceptional. Consider, for example, the pandemic-induced disruption to the norm that working time and space is differentiated from that of home and family. Apart from unsettling, and

⁷⁰See World Bank, *World Development Report 1996: From Plan to Market* (Oxford University Press 1996). Along with the genealogy of the ideas through which market-centered reforms were justified, this process is explored in K Rittich, *Recharacterizing Restructuring: Law, Distribution and Gender in Market Reform* (1st edn, Springer 2002).

⁷¹Rittich, *Recharacterizing Restructuring Ibid.*, chapter 2, Neoliberal Images of the State and Regulation.

⁷²As D Kennedy describes, such conceptions of rights are pervasive within contemporary legality and across social space; see D Kennedy, ‘A Political Economy of Contemporary Legality’ (2020).

⁷³Administrative structures and regulations are of course a normal part of all existing market economies. The locus classicus on why intervention is not an analytically tractable way of distinguishing among legal rules is FE Olsen, ‘The Family and the Market: A Study in Legal Ideology’ 96 (1983) *Harvard Law Review* 1497.

⁷⁴World Bank, *World Development Report 1996: From Plan to Market* (1995); Rittich (n 71) chapter 2, Neoliberal Imaginaries of Legal Regulation and the State.

⁷⁵Rittich, *Recharacterizing Restructuring* (n 70) chapter 6, The Gender of Restructuring.

⁷⁶This is not to suggest that this recognition necessarily, or even usually, took an equitable form. For one discussion of the gendered character of arrangements around care, see, CK Lehocki, ‘Work and Family Issues in the Transitional Countries of Central and Eastern Europe: The Case of Hungary’ in J Conaghan and K Rittich (eds), *Labour Law, Work and Family: Critical and Comparative Perspectives* (Oxford University Press 2005) 289–313.

⁷⁷Halley (n 38) 1, 95.

provoking resistance, to the norm itself,⁷⁸ for some workers, this intermingling of previously-distinct tasks and activities almost certainly transformed the content of the working day and, by extension, affected the value of some ‘private’ time and labour as well.

It seems worth observing that this transmutation of work and its value, both in the market and in the household, may occur as a by-product of interventions aimed at objectives well beyond the redesign of work itself, such as changes to the tax code, or municipal planning, zoning and environmental laws. In urban centres in particular, housing policy and the organisation of transportation may be a driver of change; indeed, we might analyze transportation law and policy as part of the care regime itself.⁷⁹ So common, and pervasive, are collateral impacts on work that we might think of the reconstruction and reevaluation of labour as constant companions of regulatory and policy interventions, whether those interventions are aimed at transformation or stabilisation, and whether they are found in municipal, transnational or international law. Consider, for example, the consequences to the organisation – and even the presence – of work that routinely ensue from shifting patterns of investment, production, and exchange, some of which are catalyzed by shifts in trade and investment law, others of which result from changing national industrial policies or initiatives in areas such as the environment, and still others of which are generated by technological and other innovations within existing rules: jobs routinely materialise and disappear, workers find new work or are displaced altogether; populations of workers migrate in search of work, finding themselves in a vast array of different circumstances, expected and not. The further move is simply to see such rules, still more, all of the rules that underpin the organisation and operation of labour within production, as part of the regulation of work itself.

Resuscitating the household as an economic space requires interrogating the structure of family law, including with the many modes of critique that form part of the anti-formalist legal toolbox.⁸⁰ But as the histories above disclose, it also requires uncovering the full legal architecture organising family relations, household labour included. Here, the animating claim, one rooted in the long-standing critical observation about the significance of background as well as foreground rules, is that the effective law of household work will encompass much more than family law *simpliciter*. As the interrogation of the distinctive status of family law, designated ‘family law exceptionalism’ (FLE), within legal relations illustrates,⁸¹ that law might be imagined as extending to those rules that regulate family relations directly as well as to those that do so indirectly, for example those that expressly make reference to the family or family members. But it also includes those that significantly impact its structure or operation without mentioning the family or family relationships at all. In many contexts, it will extend to the customary, informal, social and other ‘non-legal’ norms that interact with all of the forgoing rules as well.⁸²

The FLE taxonomy provides one mechanism by which to link legal and institutional forms and processes to the organisation of labour, the allocation of risk, the construction of bargaining power, and the distribution of profits. Part of its utility lies in providing a framework that encompasses spaces and activities, ‘reproductive’ as well as productive, that are often extruded from analyses of political economy. A signal benefit is exposing the diverse sources of normativity and

⁷⁸Employers everywhere are lamenting the difficulty of getting employees to ‘return to work’, by which they mean back to the office. See for example V Wells, ‘In the Return to Office, Workers Won’t Give Up Life-Changing Flexibility without a Fight’ (*Financial Post*, 11 September 2022) <<https://financialpost.com/fp-work/return-office-workers-flexibility-fight>> accessed 23 October 2022.

⁷⁹M Cavallo, ‘Jurisdictional Scaling Practices: A Legal Geography Approach to the Governance of Childcare in Buenos Aires City’, SJD dissertation, Faculty of Law, University of Toronto, 2022.

⁸⁰For a concise summary of such tools, see D Davis and K Klare, ‘Transformative Constitutionalism and the Common and Customary Law’ 26 (2011) *South African Journal of Human Rights* 403, Part IV.

⁸¹This claim is explored in full in Halley and Rittich (n 61) 753, and illustrated in a number of the pieces in the symposium on Family Law Exceptionalism which it introduces.

⁸²These sources of rules are designated Family Law I, II, III and IV. For a discussion of this taxonomy and its uses in the examination of family law as well as the economic household, see Halley and Rittich, ‘Critical Directions’(n 61) 753.

power now in circulation across these spaces and activities, thus placing in better view the complex dynamics, as well as the contested stakes, moral, material, and ideological, that are in play in the interaction of different legal regimes.

It is a basic insight of bargaining analysis, for example, that legal entitlements or ‘endowments’ deployed in negotiations and dispute resolution provide incentives and disincentives to the actions and decisions taken by the parties; wins and losses, moreover, may cumulate, either providing resources for or weakening a party’s position in future rounds of negotiation.⁸³ Prevailing norms, as well as the distribution of assets and resources outside, in society and in the labour market, moreover, will affect the organisation and distribution of labour, leisure, and power within the household.⁸⁴ As these endowments are effectively located in diverse legal regimes, consideration of multiple regimes may be required, both to assess the immediate status of the parties and to forecast how resources and power will be distributed over the *long duree*.

If there is a general message concerning the direction of analysis that emerges, it might be described as follows: alertness to the effects as well as the genealogy of legal classification and form; attention to the interoperation of different sources of normativity, legal and non-legal; consideration of rules and doctrines operating at some remove from the object or event of interest; and, of course, reflection on the contexts in which they touch down, the manner in which they are received and used by different actors, and the varied outcomes that may result. There are, moreover, good reasons to think that the utility of these guideposts extends beyond family law to the regulation of market work; given the intimate, often interconstitutive relationship between home and work, some of the same legal regimes may well be implicated in both.

One key to understanding how disadvantages as well as advantages accrue through the legal rules and institutions that structure productive activities – whether within or across families and markets – lies in the Hohfeldian insight concerning the correlativity of legal entitlements.⁸⁵ As Hohfeld observed, legal entitlements work in pairs: they endow and empower some actors at the same time and through the same mechanisms by which they burden or disempower others. In a flat landscape ordering relations among private actors, the conferral of legal rights, powers, and immunities necessarily places others under duties, obligations, and restraints; thus, the recognition and enforcement of legal entitlements represents not simply the realisation of market (or other) freedoms but, to some extent, a process in which someone’s freedom of action is channeled, restrained or blocked entirely even as that of another is enabled or enhanced.⁸⁶ This is an entitlement structure, moreover, in which the state occupies a distinctly coercive role.⁸⁷ To observe is not to condemn⁸⁸: we may be expressly in favour of the manner in which such rights, powers, and immunities and their correlative burdens and restraints are allocated. But just as frequently, failing to attend to either their coercive force or their fundamental relationality, we may imagine that no one comes out a loser in the design of legal rules. We may even fail to notice that anyone stands on the outside of these rules, the spaces they delimit, or the bargains that are struck within them.

Care work within the family turns out to be exemplary of such forgetting, even amidst the celebration of feminised labour markets that entail the (partial) substitution of unpaid care with extra-household, commodified care labour. Care might be imagined as a gratuitous intra-household transfer of love, or if labour at all, then work that is adequately compensated through

⁸³RH Mnookin and L Kornhauser, ‘Bargaining in the Shadow of the Law: The Case of Divorce’ 88 (1979) Yale Law Journal 950.

⁸⁴For an early analysis of these intersecting possibilities and their impact on gender relations and gender equality, see MJ Frug, ‘A Postmodern Feminist Legal Manifesto (An Unfinished Draft)’ 105 (1992) Harvard Law Review 1045. For an analysis from the discipline of economics, see B Agarwal, ‘Bargaining’ and Gender Relations: Within and Beyond the Household’ 3 (1996) Feminist Economics 1.

⁸⁵WN Hohfeld, ‘Some Fundamental Legal Conceptions as Applied in Judicial Reasoning’ 23 (1913) Yale Law Journal 16.

⁸⁶J Singer, ‘Legal Realism Now’ 76 (1988) California Law Review 465.

⁸⁷R Hale, ‘Coercion and Distribution in a Supposedly Non-Coercive State’ 38 (1923) Political Science Quarterly 470.

⁸⁸*Ibid.*

the income of the household wage earner;⁸⁹ indeed, that is often its default status, at least as long as the marriage or other legally recognised cohabitation subsists. But adopting the methodological premises of economic analysis, the provision of care could also be seen as a positive externality that confers benefits beyond as well as within the household which the recipients may treat as inconsequential and for which the provider receives no compensation.

Yet even if care is recognised as valuable labour and the household as a productive space, the absence of any (official) market for household labour means that liability for the costs of care is unlikely to be allocated through private bargains among the affected actors at home and in the market – Coase’s ‘joint producers’⁹⁰ – at least in a way that benefits the provider. It is well recognised in theory that like other market failures, this ‘missing’ market may ground some compensatory change to the entitlement structure through which parties contract over labour;⁹¹ equally well-known, and often influential, are the countervailing arguments emanating from public choice theory, namely that such ‘interventions’ represent instances of regulatory capture that serve special interests rather than public welfare.⁹² Missing in this debate, however, is a more fundamental legal point: the absence of a market in or price for household care turns out to be no accident of nature; it is itself a function of law. Put differently, law enters the picture not merely in its classic role as a potential remedy to the failure to compensate the work of care; it is part of why there is no bargain over care work in the first place.

On this point, (critical) legal analysis proves unusually helpful: What we know about externalities as a general matter is that they, too, are not found in nature. As Duncan Kennedy observed, externalities, whether positive or negative or both, exist *only* because of the structure of legal entitlements: ‘externalities [are] externalities only because there [is] no private law requiring the cost imposer to desist, or to pay the victim, or requiring the beneficiary of an externality to pay the person who generated it’.⁹³ While this state of affairs may be addressed by some public law or administrative rule requiring payment or allocating time for care, including in conjunction with labour market work, the flow – or non-flow – of compensation for the work of care is, in part, a function of what people are legally entitled or required to do with their resources, in the market as well as at home. Institutional arrangements within market economies typically permit employers and others who purchase labour to accord it little or no value. Yet as some apex courts have already recognised, when it comes to the priority of care over market work, ‘the ability to choose is often illusory’;⁹⁴ absent recognition *as* valuable work, those who deliver care are likely to simply lose out. This makes the value and cost of care not only a matter of ‘transformative’ political economy but ripe for legal intervention, potentially at the level of private as well as public law.

To sum up: It is the joint structuring of both paid and unpaid economies that makes the governance of work in all its forms a general question of political economy. The feedback loops between different sectors of the economy through which resources, time and labour flow are structured in significant part through the permissions and disabilities effectuated through legal entitlements. As they impose burdens on some parties at the same time, and through the same means, that they confer benefits upon and empower others, those entitlements influence the choices made about how and where to labour as well as the distribution of gains that result.

⁸⁹G Becker, *A Treatise on the Family* (Harvard University Press 1981); P Tsoukala, ‘Gary Becker, Legal Feminism, and the Costs of Moralizing Care’ 16 (2007) *Columbia Journal Gender & Law* 357.

⁹⁰R Coase, ‘The Problem of Social Cost’ 3 (1960) *Journal of Law & Economics* 1, is the locus classicus on the analysis of joint costs in the context of competing productive activities.

⁹¹S Deakin and F Wilkinson, *The Law of the Labour Market: Industrialization, Employment and Legal Evolution* (Oxford University Press 2005); JE Stiglitz, ‘Is There a Post Washington Consensus Consensus?’ in N Serra and JE Stiglitz (eds), *The Washington Consensus Reconsidered: Towards a New Global Governance* (Oxford University Press 2008) 41–56.

⁹²On theories of rent-seeking, see for example J Buchanan and G Tullock, *The Calculus of Consent: Logical Foundations of Constitutional Democracy* (University of Michigan Press 1962).

⁹³D Kennedy, ‘Law-and-Economics from the Perspective of Critical Legal Studies’ in P Newman (ed), *The New Palgrave Dictionary of Economics and the Law* (Palgrave Macmillan 1998) 465–474.

⁹⁴*Fraser v Canada (Attorney General)*, 2020 SCJ 28.

Obligations of care *are* now recognised as part of the official discussion, and future, of work.⁹⁵ But the envisioned adjustments remain incremental, and there are competing objectives in play, even when it comes to furthering social welfare, objectives that are likely to affect any change to underlying institutional arrangements. For example, redirecting the labour of care toward human capital formation and the future productivity of children is also a favoured policy objective,⁹⁶ and one that sometimes works against, rather than with, distributive justice concerns, including gender and racial equality. There are, moreover, many possible ways to organise the provision of care within market economies,⁹⁷ possibilities that vastly exceed those now realised within contemporary varieties of capitalism⁹⁸ or worlds of welfare.⁹⁹ Whatever proposals are on offer, it seems critical to retain attention on the legal scaffolding of production itself, as this scaffolding can be expected to mark the boundaries of work that is visible and valued, thereby affecting the status and prospects of those who deliver the labour of care.

But this legal scaffolding matters elsewhere, to other forms of work, including informal work, and to general assessments of political economy as well. As Mazzucato notes, ‘the lack of analysis of value has massive implications for one particular area: the distribution of income between different members of society’.¹⁰⁰ If the attribution and construction of economic value are, as critical insights suggest, even partly a function of legal and institutional design, then the processes by which labour and resources attract – and change – value should constitute an important frontier of distributional analysis in law.

The legal construction of value, moreover, turns out to be a point at which marginal, precarious forms of market work connect with non-market work. In some contexts, the labour undertaken for care of the family and production for household consumption overlaps significantly with informal work; it may even be indistinguishable.¹⁰¹

5. Formal versus informal work

Across the non-industrialised world, informal forms of work have long dominated local and national economies.¹⁰² Just as consistently, that informality has been targeted as a condition to be remedied, whether in the name of decent work and the recognition of fundamental principles

⁹⁵A Supiot, *Beyond Employment: Changes in Work and the Future of Labour Law in Europe* (Oxford University Press 2001); International Labour Organization, *ILO Centenary Declaration for the Future of Work* (2019); Global Commission on the Future of Work, *Work for a Brighter Future* (ILO 2019).

⁹⁶T Cookson, *Unjust Conditions: Women’s Work and the Hidden Costs of Cash Transfer Programs* (University of California Press 2018).

⁹⁷N Fraser, ‘After the Family Wage: Gender Equity and the Welfare State 22 (1994) Political Theory 591. See also Selma James and others arguing for wages for housework: S James, *Sex, Work and Class: The Perspective of Winning: A Selection of Writings, 1952–2011* (PM Press 2012).

⁹⁸PA Hall and D Soskice (eds), *Varieties of Capitalism: The Institutional Foundations of Comparative Advantage* (Oxford University Press 2001). For an argument querying the utility of the varieties of capitalism framework, especially in the wake of recent crises, see L Baccaro and J Pontusson, ‘Rethinking Comparative Political Economy: The Growth Model Perspective’ 44 (2016) *Politics & Society* 175.

⁹⁹G Esping-Andersen, *Three Worlds of Welfare Capitalism* (Princeton University Press 1990); G Esping-Andersen, *Incomplete Revolution: Adapting Welfare States to Women’s New Roles* (1st edn, Polity 2009); G Esping-Andersen, *Social Foundations of Postindustrial Economies* (Oxford University Press 1998).

¹⁰⁰Mazzucato (n 45) 12.

¹⁰¹International Labour Organization, *Decent Work and the Informal Economy* (ILO Geneva 2002) 15. For a discussion of this overlap, see K Rittich, ‘Black Sites: Locating the Family and Family Law in Development’ 58 (2010) *American Journal of Comparative Law* 1023.

¹⁰²International Labour Organization, *Decent Work and the Informal Economy* (2002); A Trebilcock, ‘Using Development Approaches to Address the Challenge of the Informal Economy for Labour Law’ in G Davidov and B Langille, *Boundaries and Frontiers of Labour Law: Goals and Means in the Regulation of Work* (Hart 2006) 63. For a discussion of how the informal economy is defined and captured, see CC Williams and F Schneider, *Measuring the Global Shadow Economy: The Prevalence of Informal Work and Labour* (Edward Elgar 2016). International Labour Organization, *Decent Work and the Informal Economy* (2002); *ILO Centenary Declaration for the Future of Work* (ILO 2019).

and rights at work,¹⁰³ poverty reduction, improved productivity and enhanced entrepreneurial activity,¹⁰⁴ an expanded tax base,¹⁰⁵ or simply the enduring association of formalisation and the rule of law with modernisation and development.

But if the formalisation of labour, and other, markets is a shared modernist aspiration, the formalisation projects now advanced by international institutions are infused by quite distinct, competing visions of society and community. As a regulatory objective, moreover, formalisation turns out to be substantively open.¹⁰⁶ The directions that formalisation might take are therefore quite varied, something clearly visible in the disparate roles assigned to law within formalisation efforts themselves. For example, the International Labour Organization advocates the inclusion of informal workers through universal access to social protection¹⁰⁷ and the extension of its mandate to improve labour standards to formerly excluded workers.¹⁰⁸ Seeking to ensure continuous innovation and productivity gains, the World Bank advises against 'rigid' regulation of the terms of employment,¹⁰⁹ on the theory that such regulations suppress growth and are themselves drivers of informality.¹¹⁰ The United Nations Development Program for its part has endorsed the alleviation of poverty and the promotion of entrepreneurial activity, through the extension of the rule of law and the recognition of 'business' and property rights as well as core labour rights.¹¹¹ At the level of legal form and content, notice how different the prescriptions for 'formalisation' turn out to be.

To complicate things further, consider the legal foundations of informality within industrial and post-industrial societies. Despite its association with the absence of development, informality is now an entrenched, and significant, part of those economies as well. Well before current crises, the contractualisation of work relations had become pervasive in the new economy, part of the organising structure of supply chains both within and across states. This contractualisation is itself a consequence of an interlinked set of transformations in the world of production that includes significant deterritorialisation and vertical disintegration of enterprise relations.¹¹² This 'fissuring' of work,¹¹³ a process sometimes referred to as informalisation,¹¹⁴ typically leaves large numbers of workers at the bottom of value chains and the margins of labour markets beyond the protective net of labour law and undercompensated relative to those in what was once 'standard' employment. For the same reasons, informality is widely recognised as a major source of poverty and economic insecurity, and hence centrally linked to questions of distributive justice.¹¹⁵ Informal economic activity also of course expands at moments when the formal economy is languishing or in trouble.

¹⁰³International Labour Conference, 90th Session, Decent Work and the Informal Economy (International Labour Office 2002).

¹⁰⁴Commission on Legal Empowerment of the Poor, *Making the Law Work for Everyone* (United Nations Development Program 2008).

¹⁰⁵F Ohnsorge and S Yu (eds), *The Long Shadow of Informality: Challenges and Policies* (World Bank 2021).

¹⁰⁶K Rittich, 'Formality and Informality in the Law of Work' in S Archer et al (eds), *The Daunting Enterprise of Law: Essays in Honour of Harry W Arthurs* (McGill-Queen's University Press 2017) 109–123.

¹⁰⁷International Labour Organization, *Decent Work and the Informal Economy* (2002) 5; *ILO Centenary Declaration for the Future of Work* (2019) Part III A (iii).

¹⁰⁸Global Commission on the Future of Work, *Work for a Brighter Future* (ILO 2019).

¹⁰⁹World Bank, *World Development Report 2019: The Changing Nature of Work* (World Bank 2019).

¹¹⁰GE Perry et al, *Informality: Exit and Exclusion* (World Bank 2007).

¹¹¹Commission on Legal Empowerment of the Poor, *Making the Law Work for Everyone* (UNDP 2008).

¹¹²H Collins, 'Independent Contractor and the Challenge of Vertical Disintegration to Employment Protection Law' 10 (1990) *Oxford Journal of Legal Studies* 353; J Fudge, 'Fragmenting Work and Fragmenting Organizations: The Contract of Employment and the Scope of Labour Regulation' 44 (2006) *Osgoode Hall Law Journal* 609; G Mundlak and K Rittich, 'The Challenge to comparative labor law in a globalized era' in M Finkin and G Mundlak (eds), *Comparative Labor Law* (Elgar 2015) 80–111.

¹¹³D Weil, *The Fissured Workplace: Why Work Became So Bad for So Many and What Can Be Done to Improve It* (Harvard University Press 2017).

¹¹⁴International Labour Organization, *Decent Work and the Informal Economy* (2002) 2.

¹¹⁵G Standing, *The Precariat: The New Dangerous Class* (Bloomsbury Academic 2011).

The magnitude of informal work – as the International Labour Organization (ILO) Commission noted, ‘billions of workers are in informal employment’¹¹⁶ – along with the inter-linkages between informality and economic insecurity all help explain the convergence of interest around informality. They are also central to the current crisis of labour law.

The legal analysis of informal work involves conceptual challenges that, to some degree, parallel those that concern unpaid work. One is the idea that a part of the law adequately stands in for the relevant law of work as a whole. The core of labour law has historically revolved around the conflict between labour and capital; as Kahn-Freund famously put it, the project of labour law is to serve as a countervailing force against the power of capital.¹¹⁷ Yet despite the enduring significance of the task, managing that conflict does not exhaust the ways in which labour law operates upon workplace relations; it crafts distinctions between workers and forms of work as well.

Labour law’s classifications and categories reflect a particular history and context, in general that of industrial work in the North Atlantic world. As is necessarily the case, these categories have a constitutive outside: the (many) forms of work that lie beyond its normative anchor, the standard employment relationship, are either of collateral interest to labour law or placed beyond its remit entirely.¹¹⁸ This includes many forms of work now deemed precarious; indeed, in confining (most of) its protections to those who work within an employment relationship and conferring greater rights upon those who work in ‘normal’ forms of employment, labour law itself helps define the zone of precarious work. Even efforts to extend protections to those at the margins may confirm the centrality of employment to the regulatory imagination, displacing attention from other important sites of regulatory interest when it comes to work. In the context of a large, and growing, informal economy the consequence is not only many marginalised or excluded workers. It is an impoverished set of legal tools for analyzing the predicaments that *all* workers face in decisions about where, when and how to work.

Hence, the utility of adopting new points of departure in the legal analysis of work. What follows are possible sites of interest, with suggestions about how they intersect with traditional regulatory concerns around work. If a common theme can be identified, it is the enduring significance of rules that enable the exercise and aggregation of market power.

One possibility is to take not employment but the condition of informality itself and its (paradoxically) complex and diffuse legal infrastructure as the object of interest.¹¹⁹ In contexts beyond the industrialised world in particular, this starting point may provide an improved vantage point for the task at hand: observing how people, resources, materials move – and, through regulatory and policy decisions, are *moved* – across the boundaries demarcating ‘productive’ market engagement from marginal trade and subsistence activity and those dividing the licit and visible from the illicit and shadowy parts of the economy. Here too, the aim is to capture what are typically lies off the screen and out of view, on the theory that informal work is both significant in its own right and, like unpaid care work and other subsistence activities, part of what stabilises and sustains economic activity in the formal economy.

As with unpaid work, the starting point lies with a more complete diagnosis of the legal structures operating within informal economies. Informal work is typically represented as work that, due to the absence of labour standards and ordinary contractual protections, lies beyond the rule of law.¹²⁰ For example, in the ILO’s definition, informal work is work that, as a matter of fact or law, lies beyond the reach of formal law.¹²¹ Yet the absence of law’s benefits or protections does not equate to the absence of law itself: informal work *is* regulated, and it is regulated by formal law

¹¹⁶Global Commission on the Future of Work, *Work for a Brighter Future* (ILO 2019) 18.

¹¹⁷Davies and Freedland, *Kahn-Freund’s Labour and the Law* (1983) 18.

¹¹⁸D Ashiagbor and K Rittich, ‘Labour, Labour Law, and the Project of International Development’ in R Buchanan, L Eslava and S Pahuja (eds), *Oxford Handbook of International Law and Development* (Oxford University Press forthcoming).

¹¹⁹This claim is addressed in Rittich, ‘Formality and Informality’ (n 106).

¹²⁰International Labour Organization, *Decent Work and the Informal Economy* (2002) 3.

¹²¹*Ibid.*; see also Williams and Schneider (n 102).

as well as by informal norms, customs and conventions.¹²² However, as with work in the formal economy, the laws that effectively regulate informal work are multiple and dispersed. Important sources of regulation, for example, may be located in municipal zoning laws or criminal laws; consider how such laws might be used to (re)locate informal activity and police workers in ways that differ from ‘normal’, that is formal, work.

Background commercial and private law rules such as property and contract law, along with laws governing the forms and powers of business enterprises, however, remain of overwhelming interest, whether in core industrial states, in the organisation of transnational enterprise, or within economies containing a mix of traditional or subsistence, industrial, and post-industrial service activities. As labour scholars and students of global value chains increasingly observe, such rules powerfully influence the prevalence of precarious and informal work, especially where production has been fragmented.¹²³ Unless otherwise influenced or restrained, legally and otherwise, commercial actors will typically use these background legal powers to minimise their financial and other obligations to workers. One route, increasingly popular, lies in converting employment into relations of independent contracting or simply ensuring that work arrangements take this form from their inception; hence the many controversies surrounding the regulation of new forms of platform and gig work.¹²⁴ But informal labour, and even forced labour, enters the production of goods and services in myriad less visible ways as well, especially where resources and inputs are sourced far from their ultimate point of use.¹²⁵

Here, the contract plays a central, if somewhat hidden, role in the organisation and support of market power. As noted above, important drivers of the deteriorating status of labour can be located in the decline of vertically integrated firms and the rise of networked production and value chains composed of fluid networks of commercial actors, including, at the bottom, workers. Relations among these entities are structured through bilateral contracts that, through doctrines such as privity of contract, typically shield those higher up and in control of the enterprise from liability for what occurs lower down or farther out in the network; here, of course, is where informal work is located, whether it takes the form of labour contracting, self-employment or even coerced labour.

It has long been established that bargaining asymmetries between the parties systematically work to the detriment of workers, permitting employers to hold out and essentially set the terms of the contract.¹²⁶ Within supply chains, the extraction of value from those bargaining asymmetries, along with the allocation of risk to the weakest parties, is central to the business model itself. Indeed, contractual freedom may permit more powerful parties to determine essential elements of the legal infrastructure of production, such as the law that governs the contract and the forum for dispute resolution. The concentration of economic gains accruing from those asymmetries, in turn, is intimately linked to growing economic inequality, and thus to the cleavages between the interests of capital and society that have reanimated interest in questions of political economy. The protean uses of contract within commercial relations, particularly those generating economic and work relations that exceed labour law’s countervailing reach, suggest that contract is destined to remain an important focus in the analysis of work.

¹²²Rittich, ‘Formality and Informality’ (n 106).

¹²³Fudge, ‘Fragmenting Work and Fragmenting Organizations: The Contract of Employment and the Scope of Labour Regulation’ (2006) 609.

¹²⁴For one survey of these issues, see the collection of essays on Crowdsourcing, ‘The Gig-Economy, and the Law’ 37 (3) (2016) *Comparative Labor Law and Policy Journal*. See also J Prassl, *Humans as a Service: The Perils and Promise of Work in the Gig Economy* (Oxford University Press 2018).

¹²⁵Report of the Director-General, International Labour Organization, *A Global Alliance Against Forced Labour* (International Labour Office, 2005). See also P Kotiswaran (ed), *Revisiting the Law and Governance of Trafficking, Forced Labor and Modern Slavery* (Cambridge University Press 2017).

¹²⁶This feature of the contract for labour been noted as far back as A Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (W Strahan and T Cadell 1776).

While remedies to disparities in the contractually-grounded market power of labour and capital have traditionally been sought via collective action on the part of workers, supported or enabled by labour law, worker collective action is not the only available form of redress: the capacity of firms and other commercial actors to aggregate market power can also be directly tackled. Here, competition law may have important uses, many of which are still unexploited.¹²⁷ As Sanjukta Paul observed, the firm itself might be seen as a legally-enabled exception to the norm against restrictions on market competition, and one that is progressively less defensible in an era of fissured work and vertically disintegrated enterprise.¹²⁸ And if product markets and consumer protection are the traditional concerns of competition law, ‘there is reason to believe that labor markets are more vulnerable to monopsony than products markets are to monopoly’.¹²⁹ Put simply, there is both an empirical and a theoretical basis for repurposing, or simply redirecting, competition law to address concentrations of market power that operate to the disadvantage of workers. Exploring these possibilities seems especially important in an era of corporate consolidation, when many sectors are dominated by a single, or very few, large firms.

For similar reasons, corporations law can also be expected to be among the regimes relevant to informal work – indeed, to work relations as a whole. Differences in the status and powers of workers are already visible among national regimes governing corporate law: compare for example the presence of worker representatives on the advisory boards of corporations in Germany with their absence, and lack of influence, under Anglo-American law. Beyond the recognition of workers as ‘stakeholders’ entitled to a voice on key corporate decisions lie other foundational questions of corporate responsibility and power. Can home country enterprises, for example, be held responsible for violations at work committed by their corporate subsidiaries legally chartered in other jurisdictions, or can they continue to shield themselves behind the corporate veil? Are international law norms available to constrain corporate behaviour and protect workers from predatory, even criminal, practices?¹³⁰ Whatever changes to the distribution of power, risk, and responsibility within corporate entities may be imagined, and whether litigation challenges to present corporate norms and practices succeed or fail, there is no question that corporate law is the source of legal endowments that matter to workers.

In the context of horizontally organised production and service-delivery that, in addition, now often crosses boundaries, the law surrounding work can be extraordinarily complex, involving transnational as well as national and international law, soft norms as well as ‘hard’ forms of regulation, and the domestic laws of the multiple jurisdictions. Private international law, or conflicts of law, thus has outsized importance on the regulatory horizon, both in the management of disputes at the interface of these legal regimes, and as a means of modeling the relationships between different modes of regulation themselves.¹³¹

Citizenship and migration rules governing workers’ employment status and entitlements may affect levels of informality any time that workers cross borders. Restrictions, or complete bars, on legal migration may themselves produce populations of informal workers, especially in the face of sharply disparate economic opportunities on opposing sides of the border. A decision on the part of a worker to overstay a work permit will normally give rise to engagement in some form of informal work, while a choice, or compulsion, to leave a dangerous or undesirable work situation may, where work permits are tied to a specific employer as is often the case, transform formerly

¹²⁷S Paul, S McCrystal and E McGaughey (eds), *The Cambridge Handbook of Labor in Competition Law* (Cambridge University Press 2022).

¹²⁸S Paul, ‘Fissuring and the Firm Exception’ 82 (2019) *Law and Contemporary Problems* 65.

¹²⁹S Naidu et al, ‘Antitrust Remedies for Labor Market Power’ 132 (2018) *Harvard Law Review* 536, 554.

¹³⁰*Nevsun Resources Ltd. v Araya*, (2020) Supreme Court Judgments 5 (Canada).

¹³¹For one illustration of the uses of private international law in a contemporary context involving complex norm interactions, see K Knop, R Michaels and A Riles, ‘From Multiculturalism to Technique: Feminism, Culture and the Conflict of Laws Style’ 64 (2012) *Stanford Law Review* 589.

licit into illicit work, although the compensation and labour conditions may themselves be fundamentally unchanged or even improved.

Tax and licensing laws are of course relevant, although not only in ways imagined by the (many) followers of De Soto – as impediments to entrepreneurial initiative and the successful deployment of capital.¹³² Such laws may legitimate economic activities that are otherwise seen as marginal – or confirm their marginality. Recognition and the ensuing normalisation of status may, in turn, grant informal workers access to income supports and other programs needed for economic success, or even survival.¹³³ But just as public benefits may be extended to those who remain informal for other purposes, formalisation does not guarantee improvements in the overall situation of workers; workers may instead end up paying for programs of no, or dubious, benefit to themselves.¹³⁴ A more complete investigation of the intersecting burdens as well as the benefits of operating laws may assist in determining which of these possibilities seem likely to ensue from formalisation in a particular context.

Finally, we should expect the magnitude of informality and the character of informal work to shift in the context of economic disruptions and crises, whether local or general. Here, the significance of macroeconomic governance once again resurfaces. While typically differentiated from ‘legal’ forms of regulation as they operate through broad mandates to govern financial flows and resources rather than sanctions backed by law,¹³⁵ at such points monetary operations may be the modes of governance that matter most to workers, formal as well as informal.¹³⁶ To recall, monetary policy is deliberately removed from political oversight, on the theory that it must be insulated from the pressures of democratic politics. Nor are monetary policy decisions subject to standard forms of legal accountability: there is no oversight by courts; no suits by individuals are permitted. Such decisions nonetheless share features that (should) attract the scrutiny of scholars of law and political economy: if monetary policy was once the province of specialists, it now seems like the exemplary background rule that is unwise to ignore.

Like other modes of governance, monetary policy may affect the bargaining power of job seekers, and in non-trivial ways. Its impact on the cost and availability of credit and, by extension, economic activity will affect business opportunities and employment levels – as well as resort to informal alternatives.¹³⁷ As described earlier, monetary operations may backstop fiscal programs that sluice money directly to enterprises and workers. The criteria for exclusion or inclusion in such schemes, a contested matter in countries such as Canada and Portugal during the pandemic, may itself be a marker – and mover – of the condition of informality.¹³⁸

The dynamics of informalisation at work may also be affected by collateral issues such as the cost and availability of housing – which themselves may turn on monetary policy: consider, for example, the effect of quantitative easing and central bank purchase of corporate debt on asset price inflation.¹³⁹ In all this, monetary policy interacts with distinctly ‘legal’ modes of workplace

¹³²H de Soto, *The Other Path: The Economic Answer to Terrorism* (Basic Books 2002).

¹³³In addition to income transfers, these might include access to credit as well as infrastructure and technological, and digital investments that aid rural producers. See Global Commission on the Future of Work, *Work for a Brighter Future* (ILO 2019).

¹³⁴GF Sinclair, *To Reform the World: International Organizations and the Making of Modern States* (Oxford University Press 2017) 90.

¹³⁵This has been described as the distinction between ‘imperium’ and ‘dominium’; see C Kilpatrick, ‘New EU Employment Governance and Constitutionalism’ in G De Burca and J Scott (eds), *Law and New Governance in the EU and the US* (Bloomsbury 2006) 121–152.

¹³⁶K Rittich, ‘Fragmented Work and Multi-Level Labour Market Governance: Informality, Crisis Policy and an Expanded ‘Law of Work’ in G De Burca et al (eds), *Critical Legal Perspectives on Global Governance* (Hart 2014) 185–206.

¹³⁷*Ibid.*

¹³⁸E Hjalmarson, ‘Canada’s Emergency Response Benefit Does Nothing for Migrant Workers’ (The Conversation 6 May 2020) <<https://theconversation.com/canadas-emergency-response-benefit-does-nothing-for-migrant-workers-136358>> accessed on 23 October 2022.

¹³⁹Tooze, *Shutdown* (n 6).

governance, as recalibrating the bargaining power between workers and those who employ them is a central ambition of labour law.

Beyond allocating resources and opportunities at work lie possible analytic parallels. Despite its now obvious capacity to alternatively drive and respond to social and political crises, monetary policy remains encased, protected from scrutiny with the claim that its management is, at bottom, a technical matter. Yet if monetary and financial governance have become connected to – or even inseparable from – problems of inequality as now appears to be the case,¹⁴⁰ this legitimating ideology might well be a candidate for forms of critique analogous to those already applied to the ‘science’ of law in the realm of adjudication.¹⁴¹ For example, if such powers amount to a significant delegation of sovereignty over the economy, can their reach be (re)imagined as a matter of political decision rather than fiat? Can we analyze their coercive properties and expressly assess their effects as between social groups, including labour and capital? Here, the road for analysis seems already open.

Given the varied stakes for those involved, ‘what to do’ about informal work is not a question that admits of a single answer; informality is a far too heterogenous a condition; informal workers operate within social, legal, and economic contexts that vary immensely; and they will have different views, and make different decisions, about how to address the predicaments they face. Nonetheless, a wider and more penetrating lens on all of the laws governing informal work stands to substantially alter the standard regulatory and policy approach to informality and perhaps to fundamentally change the questions surrounding informality as well – if only because this move alters our sense of how and where law operates on informal markets in the first place.

As will be obvious, at this point distinctions in the legal analysis of formal and informal work are substantially eroded as well. What we are left with is a merged agenda, one that imagines different forms of work as both connected and differentiated but above all shaped and constituted through legal norms and institutions, and that takes the relevant sites and forms of legal intervention – whether located in public law, private law or, almost certainly, some mix of both – to be the very question to pursue.

6. Beyond the labour/capital divide: racial and ethnic fragmentation at work

As feminists working on questions of social reproduction have already established, it is no longer safe to assume that the labour–capital relation is always the primary axis of interest within market-based economies and polities, even when it comes to classic questions of social welfare and distributive justice at work. But gender is merely one frontier of attention and concern, and it is now well-understood that its analysis necessitates the investigation of other lines of differentiation, race in particular.

Inquiries into empire and its many forms and institutions, diagnoses of colonisation and decolonisation, and histories of slavery within capitalism have challenged conventional narratives about capitalist economic relations, particularly those with transnational reach, revealing, inter alia, the fundamental significance of racialisation and ideologies of racial difference to their constitution and operation over time.¹⁴²

¹⁴⁰*Ibid.*

¹⁴¹T Grey, ‘Langdell’s Orthodoxy’ 45 (1983) *University of Pittsburgh Law Review* 1; D Kennedy, *The Rise and Fall of Classical Legal Thought* (First Published 1975, Basic Books 2001).

¹⁴²The literature on racial capitalism is large, and growing. Classic accounts include E Williams, *Capitalism and Slavery* (First Published 1944, University of North Carolina Press 2021); CLR James, *The Black Jacobins: Toussaint L’Ouverture and the San Domingo Revolution*, Revised ed. (Vintage 1989) and C Robinson, *Black Marxism: The Making of the Black Radical Tradition* (3rd edn, University of North Carolina Press 2021); see also W Rodney, *A History of the Guyanese Working Peoples, 1881–1905* (Johns Hopkins 1981); W Johnson, *River of Dark Dreams: Slavery and Empire in the Cotton Kingdom* (Harvard Belknap 2013); S Beckert, *Empire of Cotton: A Global History* (Vintage 2014); L Lowe, *The Intimacies of Four Continents* (Duke University Press 2015).

Nowhere are these processes more visible than in respect of work and labour markets. It is a truism that not only is work ‘fissured’, it is frequently fissured along racial and ethnic as well as gender lines. Within industrialised societies, racialised workers along with women predominate in precarious and informal forms of work, confirming that workers are routinely found in, and often assigned to, work based on markers of racial as well as class difference.¹⁴³ Put otherwise, workers are not simply randomly distributed across tasks, jobs, and occupations in accordance with merit, understood as skill and experience; ascriptive differences (still) matter at work. Although the precise lines of racial and ethnic differentiation vary from place to place, this phenomenon appears to be a matter of long, and enduring, historical practice.¹⁴⁴ For example, as studies of care work confirm, distinctions among workers initially traceable to colonial practices and work relations, including slavery, have ongoing life in the labour markets and workplaces of contemporary liberal societies.¹⁴⁵

This pervasive feature of labour markets remains astoundingly undertheorised and examined as a matter of law, labour law in particular. Within liberal polities, racial distinctions among workers are typically analyzed under the rubric of discrimination, to be addressed through limited public law interventions in otherwise neutral, normally functioning labour contracts and labour markets.¹⁴⁶ Although it surely ranks as a pressing question of distributive justice, hence political economy, we do not yet have an adequate set of tools through which to analyze such distinctions as structural features of work, simply part of how workplace relations are organised.

Legal scholars have analyzed the extent to which capitalist expansion, particularly in the Americas, depended on the capture and expropriation of land resources, describing in detail how the institutions and doctrines of property law facilitated and legitimated these processes,¹⁴⁷ for example by rendering land liable for debts.¹⁴⁸ Indeed, whiteness itself has been analysed as a form of property.¹⁴⁹ Yet while property itself is often important to questions of labour, investigation of the role of legal forms, ideologies, and institutions in the production of racial distinctions within jobs, workplaces, and labour markets, with the exception of domestic care work noted above, can at this point only be described as fragmentary.

Among the waypoints of interest so far we might find commentary on the reproduction of plantation labour in the colonies through contracts of indenture¹⁵⁰ and, in the United States, the legitimation of convict labor, overwhelmingly still provided by black workers, under the 13th Amendment of the Constitution.¹⁵¹ Yet apart from prison labour and the racialised use of ‘carceral work mandates’ sometimes imposed in the US for child support and debt repayment,¹⁵² how these

¹⁴³D Ashiagbor, ‘Race and Colonialism in the Construction of Labour Markets and Precarity’ 50 (2021) *Industrial Law Journal* 506.

¹⁴⁴See, for example, Cedric Robinson on the use of low-wage Irish labour in English labour markets at the dawn of the industrial revolution. CJ Robinson, *Black Marxism, Revised and Updated Third Edition: The Making of the Black Radical Tradition* (3rd edn, University of North Carolina Press 2021) 36–43. Contract labour in the colonies was explicitly organised along racial lines; see for example Lisa Lowe, *The Intimacies of Four Continents* (Duke University Press 2015); JS Furnivall, *Colonial Policy and Practice* (First Published 1948, Cambridge University Press 2014).

¹⁴⁵A Blackett, *Everyday Transgressions: Domestic Worker’s Transnational Challenge to International Labor Law* (Cornell 2019); G Winant, *The Next Shift: The Fall of Industry and the Rise of Health Care in Rust Belt America* (Harvard University Press 2021).

¹⁴⁶For a discussion and critique of this approach to racial discrimination within US law, see K Crenshaw et al (eds), *Critical Race Theory: The Key Writings that Formed the Movement* (New Press 1995).

¹⁴⁷B Bandhar, *Colonial Lives of Property: Law, Land and Racial Regimes of Ownership* (Duke University Press 2018).

¹⁴⁸K-S Park, ‘Money, Mortgages, and the Conquest of America’ 41 (2016) *Law and Social Inquiry* 1006.

¹⁴⁹C Harris, ‘Whiteness as Property’ 106 (1993) *Harvard Law Review* 1710.

¹⁵⁰T Mahmud, ‘Cheaper Than a Slave: Indentured Labor, Colonialism, and Capitalism’ 34 (2013) *Whittier Law Review* 215.

¹⁵¹M Goodwin, ‘The Thirteenth Amendment: Modern Capitalism, Slavery, and Mass Incarceration’ 104 (2019) *Cornell Law Review* 899.

¹⁵²N Zatz, ‘Get to Work or Go to Jail’ 45 (2020) *Law and Social Inquiry* 304.

legacies link to the ongoing racialisation of work and how the law assists in their (re)production is a research project in itself.

There are intriguing clues, and paradoxical findings, concerning the role of race in some current workplace controversies. For example, Veena Dubal has described how the exceptional status of platform drivers and their exclusion from the protections afforded to employees is, in California, *legitimated* with reference to the opportunities that ‘entrepreneurialism’ provides to remedy past racial injustice.¹⁵³ The barriers to entry created by citizenship and immigration rules, although widely understood to be among the normal incidents of sovereignty, including within liberal polities, can be seen as mechanisms with which to maintain, or craft, racially distinct polities,¹⁵⁴ by extension, we might also see them as technologies to produce racialised workplaces. If when it comes to the legal analysis of racialised work and labour markets, there remain far more questions than answers, it already seems clear that, as with other labour questions, more far-reaching and complex maps of the contributing legal forms and regimes are in order.

How might we come to understand the role of the contractual form, for example, once we recognise racial and ethnic differences as foundational rather than peripheral or abnormal elements of labour market operations? To what extent might ideological and methodological commitments in general circulation within professional consciousness – to the merits of liberty of contract, to the perils of interest group capture, for example – drive the evolution of doctrine or the intersection of public and private law norms?

If the undifferentiated *homo oeconomicus* or worker is decisively dethroned as the iconic subject of labour and its regulation, might we be better positioned to detect the continuing significance of status, not only as a feature of the employment relationship itself¹⁵⁵ but as a way of allocating and organising roles and responsibilities among workers, in the present as well as the past? Would we observe – and must we take account of – ‘dual economies’ in the labour markets of the North as well as the South? If so, how would we map the rules that both distinguish and connect these economies?

7. Conclusion: towards the future legal analysis of work

If moments of crisis and upheaval reconcentrate our minds on questions of economic justice, they also fuel new interest in the legal underpinnings of political economy, and at their best, catalyse intellectual innovation and disciplinary transformation within legal analysis as well. Earlier moments provide ample documentation of this ferment and its possible result, for example where established methods of adjudication no longer provided satisfactory grids for the analysis and management of class and social conflict,¹⁵⁶ we should, accordingly, expect some parallel developments now.

It seems clear that, now as in the past, labour questions provide an unparalleled vantage point from which to consider both normative questions and institutional arrangements surrounding political economy at key moments of transformation.¹⁵⁷ Democracy at work, moreover, is an important domain of democracy in itself, and the institutions for managing conflict at work are arguably central to the functioning and stability of political institutions within capitalist polities.¹⁵⁸ If there is anything to be added to this insight, it might be that the legal levers of power within conflicts at work are more varied than we have generally supposed.

¹⁵³V Dubal, ‘The New Racial Wage Code’ 15 (2021) *Harvard Law and Policy Review* 511.

¹⁵⁴E Tendiye Achiume, ‘Racial Borders’ 110 (2022) *Georgetown Law Journal* 445.

¹⁵⁵A Fox, *Beyond Contract: Work, Power and Trust Relations* (Faber 1974).

¹⁵⁶D Kennedy, *The Rise and Fall of Classical Legal Thought* (Basic 2001).

¹⁵⁷This can be observed in the prominent place occupied by labour cases in the Realist revolution in the United States. See WW Fisher III et al eds., *American Legal Realism* (Oxford University Press 1993).

¹⁵⁸R Dukes and W Streeck, *Democracy at Work: Contract, Status and Post-Industrial Justice* (Polity 2022).

For critical scholars of law and political economy now, one challenge is to expose (more) angles on the legal infrastructure that organises labour and empowers, or disempowers, those engaged in productive activity: to excavate the rules, norms and institutions that provide its scaffolding; to unfold the ideological investments that underpin its stability – or that might cause it to shift; to document how this legal scaffolding might induce particular groups of workers to follow particular paths of action or discourage them from doing so; to assess the allocation of risks and the distribution of costs and gains among the parties; and to examine the disciplinary parameters, knowledge practices, and forms of consciousness through which legal and other professionals use law and policy to advance the claims and positions of rival actors.

In this multifold task, a tremendous array of resources, new as well as old is available to be deployed. With no conceit that this exhausts the possible modes of intervention, the suggestion here is that one important task at this juncture involves reconceiving the domain of productive activity itself. To the extent that the focus remains concentrated upon market processes, parameters and preoccupations alone, the conventional sense of political economy emerges as distinctly limited. Large questions of democracy and distributive justice, at work and beyond, engage not only what goes on within the market but what lies at its margins and beyond it entirely; they also turn on how relations between commodified and non-commodified spaces and resources are constructed and maintained. Notwithstanding its enduring importance, then, the centrality of the market, its processes and dynamics, functions as a ruse, one that in blocking other domains of productive activity from view and appraisal, itself disposes political and material stakes both for those at the margins and those at the centre.

Uncovering the economic role of the household and resituating it within debates about political economy matters not simply because the household is a key site of labour and production; by implication, it can also be viewed as a location of struggle over resources and the distribution of economic gains.¹⁵⁹ Similar observations pertain to informal markets: important stakes are disposed in the shifting boundaries between formal and informal economies.

In each case, tracing the stakes in play turns out to be a legal project of the first order. To recap: as we tabulate what is going on within the economy, take the measure of its health, and consider the status and possibilities of those who labour within it, an expanded, more granular, focus on legal rules and their operations will permit us to see dimensions and dynamics of the economy that can otherwise be difficult to capture. Legal relations of a wide range shape and articulate the relationship between economic spheres, cause various forms of labour to materialise and dematerialise, to come to our attention or to fade into the background. Value is produced and destroyed in the process, and resources are allocated and reallocated among different groups.

Law not only mediates these processes, giving a certain form and stability to the organisation of social and economic relations over time. As we can see from reflection on accounts of informal and household work, work relations themselves turn out to be legal coproductions: what we recognise or 'know' about different types of labour is a product of the interaction of legal forms and rules with material processes surrounding labour itself, all combined with ideologies concerning its value and the worth of those who perform it. This makes law internal to the political and economic struggles around work at a fundamental level.

Tracking these processes and events beyond as well as within the market implies an expanded lens on the sources and processes of law: new taxonomies of legal relations might be developed, enabling different legal rules and regimes and new angles of vision on those already under consideration to be brought into analyses of work. Both public and private law are part of the story – but their contested relationship and the division of labour between them is itself part of the struggle. As the legal origins of externalities reveals, private laws remain 'microdevices for the

¹⁵⁹B Agarwal, 'Bargaining' and Gender Relations: Within and Beyond the Household' 3 (1996) *Feminist Economics* 1.

internalisation of neglected interests’.¹⁶⁰ But macroeconomic governance is no less consequential. As we connect the form of those private law micro-devices to the macro processes that are also in play, we have opportunity to rethink the utility of our conceptual grids, for the legal analysis of work, in all of its forms, and beyond.

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¹⁶⁰KH Eller, ‘The Political Economy of Tenancy Contract Law – Towards Holistic Housing Law’ 1 (4) (2022) *European Law Open* 987.

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